

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTHA SOLORZANO

Claimant

VS.

PACKERS SANITATION SERVICES, INC.

Respondent

AND

AMERICAN ZURICH INS. CO.

Insurance Carrier

Docket No. 1,056,986

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 30, 2011, Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller. Chris A. Clements, of Wichita, Kansas, appeared for claimant. Darin M. Conklin, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the evidence revealed claimant showed a reckless disregard for respondent's safety rules and procedures and, accordingly, denied claimant's request for workers compensation benefits.

The Board has considered the record and adopted the stipulations listed in the ALJ's Order Denying Compensation.

ISSUES

Claimant requests review of the ALJ's finding that claimant recklessly violated claimant's safety rules and policies and asks the Board to reverse the ALJ's denial of workers compensation benefits.

Respondent asks the Board to affirm the ALJ's Order Denying Compensation.

The issue for the Board's review is: Did claimant recklessly violate respondent's workplace safety rules and regulations so as to disallow workers compensation benefits?

FINDINGS OF FACT

Claimant had worked for respondent for one year ten months before her injury. She worked at the Tyson Meat Packing Plant in Holcomb, Kansas, as part of a team that cleaned the plant. During the course of her employment, she had never been accused of any safety violations or suffered any work-related injuries.

On July 7, 2011, claimant was working alone and had cleaned two belts on a piece of machinery. She had engaged the lock out mechanism while cleaning the machine. When she finished cleaning the belts, she disengaged the lock out mechanism. She then remembered an area underneath the belts that was often dirty and went back to clean that area. She described the area as a small area under a conveyor belt about two paper lengths from the roller. She said she daily cleaned the area while the belt was moving. She testified that on July 7, 2011, she was on her knees in preparation for cleaning the area when she lost her balance. She reached out her left hand to catch herself and the belt threw her hand and her glove became caught. Her arm was pulled toward the machine and became caught between the roller and the belt, and she suffered a fractured forearm.

Claimant testified that she did not intentionally not engage the machine's lock out. She said it was not necessary to lock out the machine when cleaning that particular area and so when she remembered to go back and clean the area she did not lock the machine.

Q. [by claimant's attorney] When you were trained, were you trained to engage the lock-up system when cleaning the belt?

A. [by claimant] Yes, to put the lock—and to lock the belt, yes.

Q. Were you also trained to engage this lock-up system when you were cleaning this area where the fat was located?

A. There you don't need the lock because that's underneath. That's why I had already locked my belt.

Q. But what I'm asking you is: When you receive your training on how to clean this area, were you instructed to leave the lock-up on while you were cleaning this fat area?

A. The security needs to be done as we're cleaning the belt and when we have other areas that are not necessary to have the lock on, that's when we unlock it and we keep on cleaning.

Q. Well, was it your understanding—Well, let me ask it this way. Did you think you were breaking any safety rules when you stuck your hand in the fat area to clean it up after the lock-up had been disengaged or shut off?

A. No.¹

During the course of her employment with respondent, claimant attended several training sessions where safety policies were reviewed. She received training on lock out

¹ Solorzano Depo. at 15-16.

procedures several times. She admitted she received safety lock out training on the very machine on which she was injured. Nevertheless, it is not clear that she understood what the policy was.

Q. [by respondent's attorney] And you were aware that the PSSI safety policies require that you lock out machines prior to working on them, correct?

A. [by claimant] Yes, correct.

Q. And are you also required to lock those out before working around those machines?

A. Yes, at a certain distance.

Q. And what is that distance?

A. Six feet.

Q. And on July 7 of 2011, the day you were injured, you were well aware of the requirement that you lock out the machine before working on it or around it within six feet, correct?

A. Correct.²

Q. [by respondent's attorney] You knew when you went back to clean that spot that you should have locked out the machine. Isn't that correct, ma'am?

A. [by claimant] That's not an area that you lock down.

Q. That's not what I asked. What I asked was: When you went back to clean the spot on the machine, you knew you were supposed to lock that machine out, correct?

A. No.³

Javier Guillen was claimant's supervisor at respondent. He confirmed that claimant had gone through several training sessions concerning respondent's lock out policy on machines. In conducting an investigation of claimant's accident, he spoke with claimant at the hospital after her surgery. He testified that claimant told him she had finished scrubbing but remembered she needed to clean one spot underneath the conveyor belt that was always dirty. Claimant told Mr. Guillen that she was trying to clean the spot when her hand got caught by the belt.

Salvador Diaz is a Technical Services Manager for respondent. He is involved with safety. He conducted an investigation of claimant's July 7, 2011, accident. He was in Texas at the time of the accident and was called by respondent's site manager at Holcomb, Kansas. He drove to Holcomb, Kansas, arriving about 6 a.m. He did some investigation at the facility then went to the hospital. He spoke with claimant and took her statement about an hour after she got out of surgery. He had no difficulty in communicating with claimant and she did not seem confused as she answered the questions. He said claimant told him:

² *Id.* at 21-22.

³ *Id.* at 34.

I had just finished scrubbing my area and had just taken off my locks. I realizing [sic] that I had forgot to [clean underneath] the conveyor. And returned to the same conveyor and stuck my hand to clean spot [underneath] the conveyor. The conveyor roller immediately grabbed my cotton glove and crushed two of my bones. I yelled for help until Eusebio Aguilar shut off the conveyor. I understand I have done wrong and never thought that it would catch my hand.⁴

Mr. Diaz' investigation includes statements taken from several of claimant's coworkers and her supervisor, none of whom saw the accident occur.

At no time during Mr. Diaz' investigation into the accident did claimant tell him she had slipped and fallen or had lost her balance. She did not say she had reached out with one of her hands inadvertently and became stuck in the machine. Mr. Diaz said respondent has a policy that every moving object would have to be "lock out tag out" if working around it. There are seven steps required to lock-out tag out. Respondent has a pinch point policy, meaning if someone is working within six feet of a pinch point, such as the roller on the machine, the machine would have to be lock out tag out.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

L. 2011, ch. 55, sec. 3 amends K.S.A. 2010 Supp. 44-501 and states in part:

(a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:

...
(D) the employee's reckless violation of their employer's workplace safety rules or regulations

K.A.R. 51-20-1 provides:

Failure of employee to use safety guards provided by employer. The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

⁴ Diaz Depo., Ex. 5 at 3.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

ANALYSIS

Compensation for a workplace injury is to be disallowed upon a showing that the injury resulted from the claimant's reckless violation of respondent's safety rules. Here, claimant's injury resulted from her actions while cleaning an area below a conveyor belt without having first "locked out" the machine. Claimant had locked out the machine to clean the belts and rollers. But she admittedly did not lock out the machine to clean an area beneath the conveyor. Claimant testified that she cleaned this area beneath the machine every day and that she never locked out the machine in order to do so. Claimant acknowledged that she had been trained to lock out a machine before cleaning it. And she had done so before cleaning the belts. Nevertheless, she did not think that safety rule applied to cleaning the area beneath the conveyor where she was cleaning when her injury occurred. This testimony is contradicted by claimant's admission that the respondent's policy was to lock out a machine before working within six feet of the machine. Nevertheless, it does not appear that claimant understood this policy applied to the work she was doing when the accident occurred.

The record shows that claimant attended respondent's education and training sessions, but the record does not show what information was presented at those sessions as to when the lock out tag out procedures are used, and it does not contain a list of the safety rules or regulations. A worker must be aware of and understand a safety rule before she can be said to have recklessly violated the rule. The record presented fails to prove that claimant's training included the safety procedures for cleaning the area in question and that claimant was thereby aware before the accident that her actions were in violation of a safety rule. Accordingly, the record fails to establish that claimant recklessly violated a safety rule or regulation.

CONCLUSION

Claimant did not recklessly violate respondent's safety rules or regulations.

⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁶ K.S.A. 2010 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated November 30, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Darin M. Conklin, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge